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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909.

ANTHONY GIARDANO and ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

SUPPLEMENTAL ANSWERING BRIEF.

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To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Two points of fundamental importance in the administration of criminal justice in this case call for the decision of this Honorable Court. Neither has been passed on with finality by this Court so as to give supervisory jurisdiction of this Court in the administration of criminal justice.

I.

The failure of the court to instruct the jury on the crime which it is alleged was conspired to be committed calls for a hearing and reversal of the decision of the court of appeals by this honorable court.

II.

This court has never passed upon the question of unanimity of verdict in a conspiracy case to be required as to the overt acts alleged as being in furtherance of the conspiracy and whether the jury must, of necessity, be instructed that they must be unanimous as to the particular overt act or acts upon which they agree as being in furtherance of the conspiracy, or whether special verdicts are required in a conspiracy case where several overt acts are alleged in order that the court may know, upon the return of the general verdict, whether the jury has actually been unanimous.

I.

The failure of the court to instruct the jury on the crime which it is alleged was conspired to be committed calls for a hearing and reversal of the decision of the Court of Appeals by this honorable court.

The conspiracy statute of the United States is very broad. Anyone who conspires to commit a crime found in any one of the penal statutes of the United States is guilty of the crime of conspiracy, but is it possible to charge a jury only as to the law of conspiracy without charging what the crime is that it is alleged that the defendant conspired to commit? In **Screws v. United States**, 323 U. S. 91, the defendants were charged with the substantive offense itself, of violation of then Section 20 of the Federal Criminal Code making it an offense willfully to deprive one, under color of law, of rights, privileges and immunities secured to him by the Constitution and laws of the

United States, and also conspiring to violate such statutes based upon the fatal beating of a person under arrest. The Court in that case failed to instruct the jury as to one word, "willfully," and as to the issue of intent. No exception was taken to the charge as required at that time. This Supreme Court said:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." 325 U. S. 107, 89 L. Ed. 1508.

As pointed out in the Screws case further, "It is only State action of a 'particular character' that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief." Likewise it is only for a specific crime, which is charged as the crime conspired to be committed, that a defendant can be placed upon trial. But here the jury was not told by the Judge what the crime was. The Court of Appeals seemed to think that because the District Attorney told the jury what he was going to try in his opening statement, that that was sufficient. Certainly what the lawyers say to the jury in any of their statements is neither evidence nor instructions. The jury was never instructed by the Judge as to the crime which the appellants were charged with having conspired. This fact alone calls for the supervisory action of this Honorable Court.

A second point of great importance requiring the supervisory determination of this Honorable Court is that of unanimity of the jury's verdict.

The sole charge in this case was conspiracy, with eight overt acts. This is the first case which this Honorable

Court has had before it aside from the treason cases where the unanimity as to the overt acts has been a matter of this Court's consideration. In the case of **Cramer v. United States**, 325 U. S. 1, this Court held that the verdict in this case had to be set aside if any of the separable acts admitted to the jury is insufficient to support the verdict where, the verdict being a general one without special findings, it is impossible to identify the grounds of the conviction. See footnote 45. But we think the law in conspiracy cases is analogous and that this Court should grant certiorari and so determine. An instruction to the jury, without telling the jury that it must be unanimous on the overt act or acts on which it agrees, would leave the situation open to where two jurors might believe one overt act, four another, another juror believe another overt act, and still another juror believe overt acts, but none of them unanimous on the particular overt act on which the conviction is based. The result of the Cramer case was to bring about special verdicts in treason cases where several overt acts were charged, with instructions that the jury should be unanimous on the overt acts on which they agreed. We think that this should be the law in conspiracy cases also.

In **Andres v. United States**, 333 U. S. 740, this Court reversed a verdict as a result of a trial in which doubt as to the adequacy of the instructions was resolved in favor of the accused, and this Court held that unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In that case the Court held that unanimity both as to guilt and punishment must be had. The Court held that the jury should be instructed that the unanimity must be both on the issue of guilt and on the issue of the punishment. Otherwise the instructions were inadequate. We respectfully contend that likewise in the conspiracy case, where the jury is merely instructed that their verdict must be unanimous, this is an insufficient instruction; that they must be unanimous as to each of the overt acts or

such overt acts on which they find the defendant guilty before they can return a verdict. In a concurring opinion in the Andres case, Mr. Justice Frankfurter said, in discussing the avoidance of confusion:

> "On the other hand, conscientious jurors are not likely to derive clear guidance if told that 'on both guilt and punishment they must be unanimous before any verdict can be found.' They should be told in simple, colloquial English that they are under duty to come to an agreement, if at all possible within conscience, for a verdict must be unanimous; that a verdict involves a determination not only of guilt but also of the punishment that is to follow upon a finding of guilt; that a verdict as to both guilt and punishment is single and indivisible; that if they cannot reach an agreement regarding the sentence that they should follow a finding of guilt, they cannot render a verdict; and this means that they must be unanimous in determining whether the sentence should be death, which would follow as a matter of course if they bring in a verdict that the accused is found guilty of the crime of murder in the first degree." **Andres v. United States**, 333 U. S. 766, 92 L. Ed. 1070.

Likewise, in the instant case the jury should be instructed that they must be unanimous on the overt act which they find, if they do find the defendant guilty of an overt act, and otherwise they cannot return a verdict. We regard this as one of the most fundamental questions of criminal law which has not been but should be, passed upon in a conspiracy case by this Honorable Court. We reassert all of the points set out in the joint Petition for Certiorari, being filed out of St. Louis by Morris Shenker and this author.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Anthony Giardano.